Washington Law Review

Volume 34
Number 2 *Washington Case Law—1958*

7-1-1959

State and Local Government

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one common grantee as against the other, which cannot be considered vested rights passing with the conveyance of the property. If both the plaintiffs and the defendants are indeed common grantees, then under the estoppel doctrine of easement, they would have a cause of action to enjoin the obstruction of that easement by the other. However, in refusing to allow the plaintiffs to enjoin the defendant's obstruction of the vacated street, the court used language indicating adherence to the "narrow" rule. In using the "necessary for reasonable access" test, the court denied easement rights to these nonabutting property owners without having previously defined the limits of that standard.

MORTON G. HERMAN

STATE AND LOCAL GOVERNMENT

Municipal Corporations—Labor Unions—Right of Municipal Employees to Strike—Governmental and Proprietary Functions. In *Port of Seattle v. International Longshoremen's Union*,[1] the Washington court pronounced that municipal corporations are immune to strikes which would endanger the public health or safety.

The pertinent facts of the case under review are as follows: The Port of Seattle is classified as a political subdivision of the state and a municipal corporation. Its functions include the operation, development, and regulation of a system of harbor improvements and rail-and-transfer-terminal facilities within that system. The private operators of port and dock facilities in the area had collective bargaining contracts with Local 9 of the International Longshoremen's and Warehousemen's Union. The port employed about 350 employees, 24 of whom were union members at the time of the controversy. While the port made use of the union's hiring hall, it had consistently refused to enter into a collective bargaining contract with the union. The union made demands for higher wages for certain of its members who were employed by the port. Upon rejection of these demands, the union members went on strike and began picketing, which resulted in the cessation of the port's operations. On the same day, January 18, 1958, the port filed a bill to enjoin the union from striking and picketing. The trial court concluded the strike was illegal and granted a temporary injunction on January 22, 1958.

This decision was affirmed by the Washington supreme court. The court began its rationale by taking recognition of the two conflicting

[1] 152 Wash. Dec. 267, 324 P.2d 1099 (1958).

principles involved: (1) the right of organized labor to strike, and (2) the general immunity of government from a strike. The union contended the port constituted a mere "proprietary" function, and therefore should have no immunity from strikes.[2] The court, speaking through Judge Finley, rejected this argument. It pointed out that the "government-proprietary" distinction was developed in common law for the purpose of mitigating injustice resulting from an unqualified application of sovereign immunity to personal injury actions. The court observed that the importance of the distinction was "waning"[3] and remarked that in any event there was no logical basis for its application to the case at hand.[4]

It is significant that the Washington court explicitly abolished the proprietary test of immunity from strikes. This test has received criticism.[5] At the present there is still a divergence of authority on this issue, but the majority appear to side with the view taken in the *Port of Seattle* case.[6]

The abandonment of the proprietary test in Washington could not be complete until the hovering form of *Christie v. The Port of Olympia*[7] was legally buried or at least camouflaged. The *Christie* case, occurring eleven years prior, also involved a municipal port and the Longshoremen's Union. However, the Port of Olympia had

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[2] Local 266, International Bhd. of Elec. Workers, AFL v. Salt River Project Agricultural Improvement and Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954).

[3] The court cites as authority for this proposition, Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957). However, the reason this case discarded the governmental-proprietary distinction was that the Florida court rejected completely the doctrine of sovereign immunity.

[4] Perhaps difficulty could be avoided by wording the issue in these cases without using the term, "immunity." For example, the problem could be simply stated as: "Is such a strike unlawful, or against public policy?" The use of the word "immunity," with respect to the right to strike, is a misnomer, since there is no legal liability from which to be "immune," in the usual sense of the word.

[5] RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW, 53-56 (1946).

[6] Cases upholding the distinction: Local 266, International Bhd. of Elec. Workers, AFL v. Salt River Project Agricultural Improvement and Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954); Norwalk Teacher's Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957). In the Manchester and Norwalk cases, the distinction was only upheld by dictum. Cases repudiating the distinction: City of Los Angeles v. Los Angeles Bldg. Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); City of Detroit v. Division 26, Amalgamated Ass'n of St. & Elec. Ry. Employees, 332 Mich. 237, 51 N.W.2d 228 (1952); City of Cleveland v. Division 268, Amalgamated Ass'n of St. & Elec. Ry. Employees, 85 Ohio App. 153, 90 N.E.2d 711 (1949); City of Alcoa v. International Bhd. of Elec. Workers Union, AFL-CIO, 308 S.W.2d 476 (Tenn. 1957); New York City Transit Authority v. Loos, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (1956). The Ohio, New York and Michigan cases were decided on the basis of statutes. The New York case also employed the argument that even if the proprietary test *did* apply, the operation of a transit system was a *governmental* function, thus coming close to the view taken by the Washington court.

[7] 27 Wn.2d 534, 179 P.2d 294 (1947).

entered into a collective bargaining agreement with the union. To ascertain the validity of this agreement, the union arranged for this test case. The Washington supreme court held the bargaining agreement valid.

The rationale in the *Christie* case focused on the issue of whether the port had the *power* to make such a contract. The finding of such power began with the argument that, since public ports have statutory authority to maintain and operate the port, they must have implied authority to employ longshoremen. And while the statute grants no power into collective bargaining contracts, the court reasoned:

> We are dealing with a very general grant of powers to a municipal corporation, but one that is not created to govern in any such sense as in the case of a county or a city, but only to engage in purely *proprietary* undertakings in direct competition with private corporations. . . . (Emphasis added.)

Thus it seems possible that the *Christie* case did employ the governmental-proprietary distinction, though not with respect to the "immunity" issue. An attempt to rationalize the *Port of Seattle* and *Christie* cases at this point would indicate a rule that the "governmental-proprietary" test is applicable with respect to the union's right to collective bargaining,[8] but the "public health and safety" test is proper with respect to the union's right to strike.

In the principal case the *Christie* decision was mentioned, admitting it inferred that a municipal port has the power to enter into collective bargaining agreements. However, the court said there was a "significant difference" between the power of a public port to make collective bargaining contracts and the power of its employees to strike.[9] This reasoning might be persuasive, were it not for the following

[8] It must be remembered that in labor disputes involving municipal corporations, the National Labor Relations Act is of no avail to the union. This statute is expressly intended not to regulate employer-employee relationships of municipal corporations. "The term 'employer' . . . shall not include . . . any state or political subdivision . . ." National Labor Relations Act, 49 STAT. 450 (1935), 29 U.S.C. 152(2) (1947). The Washington labor disputes act, RCW 49.32.010-.100, makes no express mention of the state or its political subdivision. Therefore, this statute is also of no assistance to municipal employees, following the usual rule that general legislation does not include the sovereign. United States v. United Mine Workers, 330 U.S. 258 (1947). House Bills 241 and 242, designed to make RCW 49.32.010 applicable to certain municipal corporations, were introduced in the 1957 session of the Washington legislature, but failed of passage.

[9] In Local 266, International Bhd. of Elec. Workers, AFL v. Salt River Project Agricultural Improvement and Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954), the court concluded the right to strike could not be separated from the right to collective bargaining, thus placing itself squarely contradictory to the rationale in the Port of Seattle case. The Salt River case was mentioned in the case at hand, the court flatly stating that it refused to follow the Arizona case.

statement in the *Christie* case: "The exercise of the power [to bargain with a union] was more than merely expedient. It was necessary to insure the continued performance of 'the declared objects and purposes of the corporation.'... [since otherwise the men would have] quit work."

The court in the *Christie* case also stated that the bargaining contract was consistent with public policy, since if the contract had not been made, "the men would not have continued to work," and the resulting labor dispute would have harmed the war effort (the bargaining contract was made in 1944). In saying this, the *Christie* decision seems to infer the right of a union to strike against a public port. Moreover, it is to be noted that the *Christie* case uses a public-safety argument to justify the inference of the union having the right to collective bargaining. In the *Port of Seattle* case, a public-safety argument is used to deny the union's right to strike. In view of these facts, it seems that an argument can be made that the *Port of Seattle* and *Christie* cases are inconsistent in spirit, if not in the letter.

Having abolished the proprietary test, the court was left without a legal theory to determine the case. Judge Finley solved this problem by declaring:

> In our view, the primary reason for the modern day vitality of the principle that the government is immune to strikes is to *safeguard and protect public health and safety.* The public health and safety are *not* the basis for distinguishing between governmental and proprietary functions of a municipality. . . .[10] (Emphasis added.)

Thus, by judicial fiat, Washington municipal corporations are immune from strikes by their employees if such strikes will endanger the public health or safety. Having determined the test, the court now proceeded to apply it:

> We are conscious of the fact that the common law may change with the changes in "the institutions and condition of society in this state" (see RCW 4.04.010), but this court cannot readily explore and ascertain accurately the effect on the public health and safety of a strike against a particular municipal function. It would be impossible to do so accurately on the state of the record before us in this case. The legislature is better equipped to investigate such matters extensively and fully with respect to each municipal function; and, through its general *modus operandi,* it can determine more appropriately the public policy of this state in this evolving field of conflicting interests

[10] 152 Wash. Dec. 267, 271, 324 P.2d 1099, 1102 (1958).

> and social regulation and control. Absent legislation under the circumstances here involved, we feel compelled to hold that the right to strike is subordinate to the port's immunity therefrom. It logically follows that the strike in this case was inappropriate.[11]

Thus, having created a test of public policy, the Washington court modestly declined to apply it. It would seem that the danger to the public health and safety could be more accurately determined by the court in each individual case on the basis of its own facts rather than by a formula determined by the legislature to attempt to cover all cases. In fact this almost appears like an instance of the court, having assumed the role of the legislature, declining to act as a court.

The court does not explain why in the absence of legislation it is "compelled" to hold the right to strike subordinate to the port's immunity. It would seem to be just as logical for the court to feel "compelled" to hold the right to strike paramount. Also, what does the court mean by "public health and safety"? There was no evidence that the Port of Seattle strike was *in fact* endangering the health or safety of the public.[12]

Speculation as to the possible trend indicated by the *Port of Seattle* case provokes considerable difficulty. The court's words at face value seem to say that until there is legislation to the contrary, Washington courts can feel free to grant injunctions prohibiting all strikes by all municipal employees.[13] It is yet to be seen whether this reluctance of the court to ascertain the effect of a strike on the public health and safety could be overcome by evidence inducing findings of fact by the trial court that such strike would not endanger the public.

Moreover, taking the "public health and safety" test by itself, a broad application of it would still result in a general prohibition against municipal employees striking. Perhaps the law at present is

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[11] 152 Wash. Dec. 267, 272, 324 P.2d 1099, 1103 (1958).

[12] Counsel for the Port of Seattle did not even allege the public health and safety was endangered. In fact, the only mention of this issue was raised by the union: "No vital public service was in danger. . . . The health, safety . . . was in no way jeopardized." Brief for Appellants, p. 13, Port of Seattle v. International Longshoremen's Union, 152 Wash. Dec. 267, 324 P.2d 1099 (1958).

[13] Such a rule prohibiting all strikes by municipal employees seems to be in force in the following states: California: City of Los Angeles v. Los Angeles Bldg. Trades Council, 94 Cal. App.2d 36, 210 P.2d 305 (1949); Florida: Miami Water Works Union v. Miami, 157 Fla. 445, 26 So.2d 194 (1946); Michigan: City of Detroit v. Division 26, Amalgamated Ass'n, St. Ry. Employees, 332 Mich. 237, 51 N.W.2d 228 (1952); Ohio: City of Cleveland v. Division 268, Amalgamated Ass'n, St. Ry. Employees, 85 Ohio App. 153, 90 N.E.2d 711 (1949); Pennsylvania: Broadwater v. Otto, 370 Pa. 611, 88 A.2d 878 (1952). The Florida case seems to indicate that its public employees do not even have collective bargaining rights.

simply that Washington's public employees do not have the right to strike.

It might also be observed that the test of danger to the "public health and safety" logically ought apply to strikes against privately owned functions as well as government-owned ones.[14] Certainly a formidable argument can be made that the public safety is as much endangered by the strike of a privately owned transit system, for example, as it is when the system is publicly owned. Of course it is not likely that the court will ever so hold. But what if there were a general strike of all longshoremen, stopping operations of all the docks in Seattle? Could the court possibly grant an injunction against only the striking longshoremen employed by the Port of Seattle, on the grounds of the danger to public health and safety, while leaving the major portion of Seattle's dock area inoperative? This would leave the public safety test in an absurd posture.

To summarize the probable effect of the *Port of Seattle* cases on municipal corporation employees, it is first noted that this decision makes no mention of the right to join a union.[15] With respect to the right to collective bargaining, the case by implication also restricts this right to the public safety test.[16] The decision did expressly state

[14] This possibility, with respect to the Port of Seattle decision, is raised in MUNICIPAL LAW SERVICE LETTER, Vol. 8, No. 8 (October 1958) A.B.A. Rep.

[15] Apparently schoolteachers do not have the right to join a union in Washington. Seattle High School Chapter No. 200, Am. Fed'n of Teachers v. Sharples, 159 Wash. 424, 293 Pac. 994 (1930). This case held that a school district had the power to enforce a resolution which would refuse employment to any teacher who declined signing an oath that he was not and would not become a member of the teacher's union. Following the example of other states, it is probable that firemen and policemen are also so restricted. Newmarker v. Regents, Univ. of California, 325 P.2d 558 (Cal. 1958) (firemen and police); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W.2d 310 (1943) (police); City of Jackson v. McLeod, 199 Miss. 696, 24 So.2d 319 (1946) (police); Carter v. Thompson, 164 Va. 312, 180 S.E. 410 (1935) (firemen).

[16] By force of RCW 35.22.350, certain public utility districts have the *power* to enter into collective bargaining contracts. This is not the same as giving the employees the *right* to collective bargaining, but once such a contract has been made, it is enforceable. Hence this statute places those employees affected by it in a position slightly advantageous to their counterparts in such states as California. State v. Brotherhood of R.R. Trainmen, 37 Cal.2d 412, 232 P.2d 857 (1951).

In the Christie case, since the Port of Olympia *had consented* to bargain with its employees, the strict holding of the decision was only that this bargaining agreement was enforceable. Thus, such a narrow application of the Christie case would do no more than extend the force of RCW 35.22.350 to *all* municipal corporations engaged in proprietary activities.

Viewing the Christie case in light of the case at hand, it must be noted that the Port of Seattle had consistently refused to enter into a collective bargaining agreement with the union. Hence, the decision prohibiting the Port of Seattle employees from striking also prohibited them from using their only practical means of compelling the port to bargain. It therefore appears that while the Port of Seattle case does not expressly restrict municipal employees' right to collective bargaining, nevertheless its operative effect will be to limit this right to those instances where the municipal employer has consented to such bargaining, and the public safety test is satisfied.

that the right of municipal employees to strike is limited by said test. Moreover, the court's decision indicates that danger to the public safety by such a strike will always be presumed until the legislature provides a formula for the court to apply in such cases. Apparently this means that Washington municipal employees now have no right to strike. It remains to be seen whether the legislature or the court itself will alter the results evidenced by the case examined in this Note.[17]

The current rapid expansion of both government and labor would suggest that conflict between them may increase in the years to follow. It is unfortunate that the *Port of Seattle* case has possibly added more confusion than clarity to this critical subject.

DONALD P. LEHNE

Incorporation of Municipalities—Delegation of Legislative Power. In *Port of Tacoma v. Parosa*,[1] the Washington Supreme Court declared that chapter 173, Laws of 1957, was constitutional. Section 7 (RCW 35.02.070), which was the section most under attack, reads as follows:

> Upon final hearing on a petition for incorporation the board shall establish and define the boundaries of the proposed city or town, being authorized to decrease but not increase the area proposed in the petition and any such decrease shall not exceed twenty per cent of the area proposed; it must also determine the number of inhabitants within the boundaries it has established: *Provided,* that the area shall not be so decreased that the number of inhabitants therein shall be less than required by RCW 35.02.010. [Three hundred inhabitants.]

The board referred to is the board of county commissioners. Prior to the passage of the above enactment, the board had almost complete power to change the proposed boundaries to reflect the findings of their hearings on petitions for incorporation. The only limitation on the commission's boundary-fixing power was that the proposed area could not be enlarged.

At the time the Laws of 1957 went into effect, the Pierce County Commissioners were in the process of holding hearings on the petition

[17] During the recent session of the Washington State legislature, it appeared likely for some time that one such alteration would be enacted. H.B. 126 provided: "It shall be lawful for the employees of a publicly owned municipal or urban transit system to organize into labor unions for the purpose of collective bargaining. . . ." This bill passed the House by a 69-17 margin on February 17, 1959. The Senate, however, failed to act upon it.

[1] 152 Wash. Dec. 145, 324 P.2d 438 (1958).

to incorporate a city to be called Tidehaven and to be located near Tacoma. The petition was filed with the Pierce County Auditor on Decmber 15, 1956. The proposed municipal corporation was to include two square miles (1,280 acres), which were a part of an area known as the Industrial Devlopment District, an area being developed by the Port of Tacoma, plus a continguous sixty-five acres lying wholly without the Industrial Development District. At the time the petition was signed, the sixty-five-acre tract had a population of 184 persons, while that of the other area was 187 persons. Subsequently, as a result of condemnation proceedings by the Port of Tacoma, the population of this latter area had decreased by nineteen persons, and sixteen more were scheduled to move by December 1957. The board then informed the Port of Tacoma that they were bound by the new laws and lacked the power to exclude more than twenty per cent of the proposed area. In the subsequent suit, instigated by the Port of Tacoma, the trial court held the law to be unconstitutional, and on appeal the supreme court reversed that judgment.

The two arguments against the constitutionality of the act in question were that it was an unlawful delegation of legislative power to private persons (the registered voters in the area who could petition for incorporation)[2] and that it violated the due process clause of the fourteenth amendment to the Federal Constitution. The latter problem did not need to be decided in the case under discussion, for, as the court pointed out, the complainant did not indicate what rights it would lose by the proposed incorporation. Without such a showing, there could be no decision of unconstitutionality on the grounds of deprivation of life, liberty, or property.

In arguing that the law provided for an unlawful delegation of legislative power to private persons, the primary contention of the complainants was that fixing the boundaries of a municipal corporation is a legislative function. Since the power of the commissioners to change the boundaries proposed by the petitioners was so severely limited, the complainants argued that the power to fix the boundaries was placed in the hands of the petitioners. As the court correctly pointed out, it is the commissioners' power to propose boundaries, not their power to fix boundaries, that is limited. Actually, neither the petitioners nor the commissioners can fix the boundaries. The boundaries are fixed only when a majority of the people in the designated

[2] The petitioners must be registered resident voters equal in number to 20% of the voters in the last state election. RCW 35.02.020.

area vote for incorporation. Therefore, said the court, even assuming that the commissioners had no power to affect the boundaries and that the power of the petitioners to fix the proposed boundaries was absolute, the question was: Can the legislature confer on the majority of people in a given area the right to decide whether such area shall become a municipal corporation?

Since municipal corporations are creatures of the state and created by constitutional and statutory provisions, the fixing of all conditions and requirements of incorporation, including the boundaries of the corporation, are a legislative function.[3] In fact, the power of the state legislature to fix boundaries of municipal corporations is absolute where such power is not limited by constitutional provisions.[4] In Washington there is such a limitation, for the constitution provides that the legislature may enact only general laws providing for the creation of municipal corporations.[5] Such a limitation leaves the legislature only the power to fix the terms and conditions under which a given area can become a municipality. This of course contemplates that the legislature must be able to designate some officer or official body which would determine when the conditions and terms set by the legislature had been satisfied. Upon such a determination, the general enactment of the legislature would operate, and a municipality would be created.

A problem arises when the standards set by the legislature in their general laws are not complete, in that they leave to the discretion of the inhabitants the fixing of the boundaries. As pointed out above, that is exactly what the enactment under discussion does.

In a prior Washington case, *Territory ex rel. Kelly v. Stewart*,[6] holding unconstitutional a former statute providing for the incorporation of cities and towns,[7] the court said:

> While a statute may be conditional and only take effect upon the happening of a future event, we hold that the place where it is to operate, its *"situs,"* must be fixed definitely by the legislature itself or delegated to some body or agency capable of exercising legislative functions, and not left to the will or caprice of localities to determine whether it shall be applicable to their particular community or not.[8]

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[3] Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).
[4] Wheeler School Dist. v. Hawley, 18 Wn.2d 37, 137 P.2d 1010 (1943).
[5] WASH. CONST. art. 11, § 10; art. 2, § 28.
[6] 1 Wash. 98, 23 Pac. 405 (1890).
[7] LAWS OF WASHINGTON 1887-8, c. 126, § 1.
[8] 1 Wash. 98, 107, 23 Pac. 405, 408 (1890).

Courts of states other than Washington have expressed views similar to those presented above. Nebraska, while agreeing that an officer or official body may determine if the conditions necessary to the applicability of a general law are present and that voters of an area affected may decide whether to give effect to a general law, did find unconstitutional an enactment which "attempted to delegate to a few petitioners the power to fix the boundaries of a new district and to determine the electorate to pass upon its creation."[9] In the same opinion, the court distinguished cases involving the merger of two areas or those in which an area is annexed to an already existing city and in which the final decision is left in the hands of the voters of the areas involved.

In an earlier case,[10] the Nebraska court expressed similar views when considering a statute which provided that when a petition was properly signed by ten per cent of the freeholders in a given area, the boundaries of which were fixed by the petitioners, an election would follow as a matter of course. In holding this act unconstitutional, the court said:

> Upon a closer scrutiny, and a careful consideration of the various provisions of the statute, it becomes apparent that the petitioners in the first instance fix the boundaries of the proposed district. To be sure, the district is not created until the plan is approved by majority vote of the electors of the district, but as the petitioners fix the boundaries in the petition they can so arrange the boundaries as to exclude from the district a small plat of land on which any elector might reside.[11]

In making the above statement, the court was primarily influenced by the fact that the statute provided for no hearing on the petition or for any tribunal to determine if any lands were unjustly included or excluded. Again, it was not the fact that the voters in an election were going to legislate that bothered the court, but the fact that the petitioners, and not some responsible legislative body, designated who these voters were to be.

In passing upon the validity of the statute in question and making the assumption that the *petitioners* had the power to *fix* the proposed boundaries, the Washington court placed the case squarely within the situation covered by the rule propounded by the Nebraska court in the above cases. By upholding the enactment, the Washington court

[9] Rowe v. Ray, 120 Neb. 118, 231 N.W. 689 (1930).
[10] Elliott v. Wille, 112 Neb. 86, 200 N.W. 347 (1924).
[11] *Id.* at 200 N.W. 348.

not only took a stand contrary to that of the Nebraska court but was willing to state that "insofar as *Territory ex rel. Kelly v. Stewart*, supra, is in conflict with this decision, it is hereby overruled."[12]

This latter step may not be as significant as it at first seems. First of all, the facts of the *Kelly* case seem to make it authority only for the rule that the legislature may not delegate legislative functions to the *judiciary* department under the separation of powers clause of the state constitution.[13] According to an annotation,[14] this Washington decision is not in accord with the decisions in a majority of jurisdictions. "In a minority of the cases it is held that a statute which imposes on a judicial court the exercise of a non-judicial function in regard to the creation or change of municipal corporations is unconstitutional under the provisions separating the powers of the government."[15] In addition, it must be noted that the *Kelly* decision was based upon facts arising prior to the adoption of the state constitution with its provision restricting the legislature to general laws providing for the creation of municipal corporations.

In taking the stand that it does in the *Parosa* case, the Washington court is not without support in other jurisdictions. Several cases offering varying degrees of support are cited in the opinion. In at least one of these, *Dowell v. Board of Educ.*,[16] the Oklahoma court discussed the Nebraska rule and decided directly to the contrary on facts much like those in a Nebraska case.[17] Apparently Oklahoma was more swayed by the possible benefits derived from allowing local people to make decisions in local matters than by the fear of gerrymandering which concerned the Nebraska court.

As mentioned above, the Washington court took the stand it did after accepting the complainant's contention that the statute under attack allowed the petitioners to fix the proposed boundaries and thereby determine the electorate which was to decide whether to incorporate. If, instead of accepting this contention, the court had found that the statute, although severely limiting the power of the county commissioners to change the proposed boundaries, did leave the final determination with the commissioners, the Washington statute would have satisfied the Nebraska rule.

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[12] Port of Tacoma v. Parosa, 152 Wash. Dec. 145, 155, 324 P.2d 438, 445 (1958).
[13] WASH. CONST. art. 2, § 1, amend. 7.
[14] Annot., 69 A.L.R. 266 (1930).
[15] *Id.* at 294-95.
[16] 185 Okla. 342, 91 P.2d 771 (1939).
[17] Rowe v. Ray, 120 Neb. 118, 231 N.W. 689 (1930).

It is only when the proposed area includes exactly three hundred people that the commissioners are entirely without discretion as to the proposed boundaries. Since, in the case being noted, the area contained more than three hundred people, complainants could not argue unconstitutionality on that ground. Therefore, it would seem that the court could have reached the finding suggested above.

If the court did not overlook this possibility, but forced itself to take a stand on the Nebraska rule, then, by deciding contra to the Nebraska cases, the court has demonstrated its faith in the ability of the people properly to handle matters primarily of local concern. This would seem to follow the spirit of the state constitution, which provides for home-rule charters[18] for the cities of Washington.

If, as the facts of this case seem to indicate, this statute allows newly incroporated areas to include within their city limits property which will not benefit from being part of the new municipality but will add to the city's taxation revenues, there is some question as to whether this can be labeled "properly handled local affairs." Perhaps, therefore, the final question to be asked is: Is the faith in the ability of the people well founded?

JOHN F. COLGROVE

Legislative Power of First-Class Cities—Use of Parking Meters for Private Advertising Purposes Upheld. In *Winkenwerder v. City of Yakima,*[1] the court has declared that a first-class city in the State of Washington may contract with a private business, allowing such business to use the tops of city parking meters for advertising purposes.

On July 26, 1955, the Yakima city commission passed ordinance number B-1720 providing for such use of its parking meters. The ordinance stipulated the number of meters to be so used and the consideration to be paid the city. All revenue so obtained was to be used in offsetting part of the city's traffic regulation expense. The ordinance further provided that there should be no interference with, or obstruction of, the use of the meters for the regulation of parking. Pursuant to this ordinance, a contract was entered into granting advertising use of parking meters for a period of six months with renewal at the option of the city. A copy of this agreement, attached to the ordinance

[18] State *ex. rel.* Everett Fire Fighters v. Johnson, 46 Wn.2d 114, 278 P.2d 662 (1955); WASH. CONST. art. 11, § 10.

[1] 152 Wash. Dec. 547, 328 P.2d 873 (1958).

and made a part of it, contained provisions making all advertising subject to approval of the city commission, expressly restricting the use of such signs for political and religious advertising, banning the advertisement of intoxicating beverages, and stipulating how near to a given business advertising of a competitor could be located.

A retail hardware and appliance dealer and a publishing company, both owning property and doing business on streets where signs approximately twelve inches long and four inches high had been affixed to parking meters, challenged both the ordinance and the agreement by asking for a declaratory judgment declaring them invalid. Further relief in the form of an injunction was requested. The Superior Court of Yakima County entered a judgment for the complainants, and the state supreme court, in an opinion by Judge Finley, reversed that decision.

The first issue to be settled concerned the scope of the legislative power of first-class cities in Washington. Municipal corporations are creatures of the state, created by constitutional provisions and statutory enactments, and have no inherent powers. In this respect, corporation powers are quite different from those of the state itself. While the state constitution is an instrument *limiting* the powers of the state, leaving with the state all powers not thereby taken away,[2] consitutional provisions and general laws enumerating the powers of corporations are normally looked upon, as is the Federal Constitution, as *grants* of power, denying all powers except those granted. Since first-class cities are corporations, it would seem that their powers would be limited to those expressly granted by the state constitution and state legislative enactments, with further limitations possibly to be found in the individual city charters. At most, such powers, it seems, might be extended to include those necessarily implied by the expressly granted powers.[3]

In *Pacific First Federal Sav. & Loan Ass'n* v. *Pierce County*,[4] the court said that municipal authorities can exercise no powers except those expressly granted and that, if doubt should arise as to their right to exercise any specific power, such right must be denied. This is in line with the general rule of statutory construction and interpretation that statutes in derogation of the common law, among which

[2] Union High School Dist. No. 1 v. Taxpayers, 26 Wn.2d 1, 172 P.2d 591 (1946).
[3] State *ex rel.* Port of Seattle v. Superior Court, 93 Wash. 267, 160 Pac. 755 (1916).
[4] 27 Wn.2d 347, 178 P.2d 351 (1947).

are statutes granting powers to corporations, are to be strictly construed.[5]

In Washington, where cities enjoy "home rule," there is at least one exception to the above-stated rules. Article XI, section 10, of the state constitution gives cities of 20,000 or more population permission to frame their own charters, subject to, and consistent with, the constitution and statutes of Washington. In addition to this, statutes relating to first-class cities must be liberally rather than strictly construed if the legislative intent is to be carried out.[6] Such constitutional and statutory provisions led the Washington court in *State ex rel. Ennis v. Superior Court*[7] to say that it is evident that in Washington cities of the first class are vested with very extensive powers, subject to and controlled only by general laws. The court further said that the rule of resolving doubt concerning the existence of power against municipal corporations does not apply when such a corporation is a city of the first class. In other cases the court has in effect said that the only limitation upon the powers of cities of the first class is the limitation that they do not contravene constitutional or statutory provisions.[8] In the *Winkenwerder* case, the court made it clear how far it was willing to go in this direction by saying, "a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature."[9]

In making the above statement, the court apparently did not consider its conflict with the decisions in cases concerning the power of eminent domain. While, within its own jurisdiction, a state possesses an inherent power of eminent domain,[10] a municipal corporation can exercise such a power only when it has been expressly authorized by the legislature and only through a use of those procedures expressly authorized.[11] In other words, statutes conferring the power of eminent

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[5] *In re* Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926).

[6] Rem. Comp. Stat. § 8982. This section is from Rem. Comp. Stat. of Washington for the year 1922. Title LX, Municipal Corporations; Chapter VII, Cities of First Class, General Provisions; § 8982, Liberal Construction, reads: "The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act, but the same shall be liberally construed for the purposes of carrying out the objects for which this act is intended."

[7] 153 Wash. 139, 279 Pac. 601 (1929).

[8] Washington Fruit and Prod. Co. v. Yakima, 3 Wn.2d 152, 100 P.2d 8 (1940); Walker v. Spokane, 62 Wash. 312, 113 Pac. 775 (1911); State *ex rel.* Griffiths v. Superior Court, 177 Wash. 619, 33 P.2d 94 (1934).

[9] 152 Wash., Dec. 547, 552, 328 P.2d 873, 878 (1958).

[10] State *ex rel.* Eastvold v. Yelle, 46 Wn.2d 166, 279 P.2d 645 (1955); 18 AM. JUR., *Eminent Domain*, § 19 (1938).

[11] Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991 (1909); 18 AM. JUR., *Eminent Domain*, § 27 (1938).

domain must be strictly construed. It seems hardly possible that the court meant to overrule this principle without even mentioning it; it was applied as recently as 1955 in *Tepley v. Sumerlin.*[12] The conclusion that must be reached is that the power of eminent domain will continue to be an apparent exception to the rule that a first-class city has as broad legislative powers as does the state.

Since the complainants did not allege that the ordinance passed was inconsistent with any state legislative enactment, it need only be determined whether the power to pass such an ordinance is denied by the state constitution or the Yakima charter.

The general rule is that every presumption is in favor of the constitutionality of an ordinance.[13] Since there was no question that the parking meters concerned were the property of the city, the issue to be decided was whether the city had the power to use its property for advertising purposes. By the nature of their challenge, complainants contended, in effect, that secondary or incidental uses of public property for private gain are unconstitutional unless such uses justify eminent domain proceedings.

Since it has been decided that a first-class city has legislative power comparable to that of the state, an examination of the state's powers with regard to secondary uses of public property is enlightening. The case of *State ex rel. York v. Board of County Comm'rs,*[14] a case quoted from at length in the opinion under discussion, contains perhaps the best examination of such state powers. In dealing with the permissible secondary uses of state highways, the court declared in the *York* case that, as long as the streets and highways are maintained for their primary purposes, abutting landowners are entitled to compensation only when a secondary use results in an *unreasonable* encroachment upon their rights. Only when the encroachment is unreasonable is there a constitutional taking or damaging, so that the interference must be justified as for the public use. In as much as it was found that there was no obstruction of Winkenwerder's right of access or of the public's view of his store and no interference with public passage or the primary function of parking meters, it was concluded that there was no "unreasonable" encroachment upon anyone's rights.

In addition to justifying such an incidental use of public property

[12] 46 Wn.2d 504, 282 P.2d 827 (1955).
[13] Spokane v. Coon, 3 Wn.2d 243, 100 P.2d 36 (1940).
[14] 28 Wn.2d 891, 184 P.2d 577 (1947).

for private gain, the court quite plausibly pointed out that the revenue gained which would lighten the public tax burden, public safety slogans which were to be installed in some of the signs free of charge, as well as the advertising itself, were all public benefits. This would mean that the use sanctioned by the ordinance in question could be classed as public in nature.

The only other allegation of unconstitutionality seemed to stem from an erroneous belief on the part of the complainant publisher that constitutional prohibitions against unlawful taking of property without compensation or without due process of law protected him from business competition.[15]

The complainants also strongly contended that the ordinance failed to comply with article 11, section 2 of the Yakima charter which reads:

> No franchise or right to occupy or use the streets, highways, bridges, or public places of the city shall be granted, renewed or extended except by ordinance, which ordinance shall be submitted to a vote of the electors of the city at a general or special election and shall not become operative unless approved by a majority of the electors voting upon said franchise; . . .

The city argued that the words "or right to occupy or use the streets, highways, bridges, or public places of the city," meant the same thing as "franchise" when used in an article entitled "Franchises." It was the city's further contention that the contract entered into was something less than a franchise and therefore was not subject to the voting requirement of the charter. Whether the ordinance and incorporated agreement constituted the granting of a franchise or something less is rather hard to determine. In *Lanham v. Forney*[16] the court attached the label "franchise" to what in that case was a "formal and permanent contract." Other cases have given a variety of meanings to the term "franchise."[17]

[15] Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934).

[16] 196 Wash. 62, 81 P.2d 777 (1938).

[17] In a case involving the right to put poles, wires, and conduits in the public streets, a franchise was said to be "a special privilege which does not belong to citizens of common right." State *ex rel.* Pac. Tel. & Tel. Co. v. Department of Pub. Serv., 19 Wn.2d 200, 142 P.2d 498 (1943). In City Sanitary Serv. Co. v. Rausch, 10 Wn.2d 446, 117 P.2d 225 (1941), the exclusive right to collect garbage for a certain period of time was held not to be a franchise. In a case where a company was authorized to maintain lines and conduits for steam and hot water in the streets, the word "franchise" simply meant a right granted to a corporation or an individual to do things which could not otherwise be done by them. Washington Water Power Co. v. Rooney, 3 Wn.2d 642, 101 P.2d 580 (1940). In another case involving the right to put telephone poles in streets and alleys, the court said that "a 'franchise' is in the nature of a contract and cannot be altered or amended during its life by the grantor to the detriment of the grantee by adding new burdens thereto." Pacific Tel. & Tel. v. Everett, 97 Wash. 259, 166 Pac. 650 (1917).

While under these cases it is unclear whether the agreement in question does grant what is generally called a franchise, it is not clear what better name could be attached to the advertising company's right. A license is in no sense a contract between the state and licensee. A license is usually granted by parol, is often given without consideration, and may be revoked at the will of the licensor.[18] The advertising company's right is clearly something more than a license.

The court avoided having to decide just what the extent of the interest granted was. After agreeing with the city in its construction of section 2 of article 11, it went on to cite the part of section 3 that reads, "no franchise shall be granted unless there be inserted therein a provision that the city may acquire the public utility for the exercise of which the franchise is granted. . . ." Art. 11 therefore applies only to franchises and at that only to franchises granted to public utilities.

In arriving at its construction of the charter, the court said that, since the word franchise admits of many meanings, it is appropriate to look at the other words in the article to determine the meaning intended by the drafters. It was clear to the court that the words "or right to use or occupy" were inserted only to help in solving this problem. It is interesting to note that in *Washington Fruit and Prod. Co. v. City of Yakima,*[19] the court was faced with deciding whether the use of the streets by a power company in supplying lighting to the city was subject to the requirements of Art. 11. Since the court declared that the use in that case was a license rather than a franchise, it could seemingly have disposed of that problem through the simple construction technique employed in the principal case. Instead the court treated the phrase "or right to occupy or use the streets" separately from that part of the article dealing with franchises and decided the issue on other grounds.

As a result of the decision in *Winkenwerder v. City of Yakima,* there is no longer any question as to the scope of the legislative power of cities of the first class. It is equal to the legislative power of the state, limited only by constitutional provisions, state legislative enactments, and city charters. This conclusion should be tempered by adding that municipal powers of eminent domain are more constricted.

A construction has been placed upon article 11 of Yakima's city charter which will in the future allow little dispute as to what uses of

[18] Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398 (1899).
[19] 3 Wn.2d 152, 100 P.2d 8 (1940).

public property will be subject to the voting requirement. Only the preliminary question of whether the use granted to a public utility is a franchise will need to be considered. While this question can present considerable difficulty, no longer will it be necessary to decide whether the use falls under the phrase "right to occupy or use," as well as "franchise."

It could be argued that this decision opens the door to any use of any public property for commercial advertising purposes. As stated by a Pennsylvania court:

> If the city's position is tenable, it could then divert to private and commercial use all forms of apparatus maintained by the city on sidewalks of private property. Thus, the city's fire plugs, fire alarm boxes, police call boxes, and traffic light standards could be utilized by the city for commercial advertising, if the principal for which defendants are here contending is valid.[20]

Washington, however, was not swayed by "a parade of horrible possibilities," the court reserving decision on other situations until they became realities. Thus, the *Winkenwerder* case extended the doctrine of incidental and secondary uses generally to allow city property to be used for advertising purposes, without stating that all such uses would, in the future, be upheld.

JOHN F. COLGROVE

Eminent Domain—Market Value—Valuation of Mineral Deposits. In *State v. Mottman Mercantile Co.*[1] a divided court held evidence of the value per unit of mineral deposits to be admissible in determining the market value of land in condemnation proceedings. As empowered by statute,[2] the state sought condemnation of 15.6 acres of land, from which it planned to extract gravel for use in an adjacent highway construction project. A dispute arose over the proper amount of compensation to be awarded for the tract.

The state's witnesses testified to the effect that the highest value of the property was as farm land rather than as a gravel pit because of the excess of supply over demand for gravel in the area. These witnesses determined that the tract's value as farmland was between $125.00 and $150.00 per acre. The landowner's witness, however, testified that the property's highest value was as a potential source

[20] Chestnut Hill & Mt. Airy Business Men's Ass'n v. Philadelphia, 87 Pa. D. & C. 209 (1954).

[1] 51 Wn.2d 722, 321 P.2d 912 (1958).
[2] RCW 47.12.010.

of gravel (the state having conceded that the site contained 283,000 cubic yards of usable material) and that as such it had a market value of $600.00 an acre. To support this theory, the landowner offered to prove by his witness that the value of the gravel contained on the tract was ten cents per yard. The state objected to this offer on the ground that it was based on "an improper method of arriving at a conclusion of value." The objection was sustained. A verdict was given in the amount of $3,350.00, based on an evaluation of $150.00 per acre plus an additional $1,000.00, added by stipulation of the parties, for the timber on the property. The landowner appealed, citing as error the trial court's refusal of his offer of proof of the value per unit of the gravel in place in the condemned land. The judgment was reversed, the supreme court maintaining that evidence of value per unit of minerals was admissible, not as a precise measure of value, but as an explanation or foundation for estimates made of the market value of the property.

In reaching its conclusion, the court recognized the well-established doctrine that the value of mineral-bearing property should not be determined by multiplying the assumed amount of mineral deposits by a given unit price.[3] Such a method of evaluation has been considered too speculative, first because of the uncertainties and contingencies of supply and demand, and secondly because of the speculative nature of quantitative estimates themselves.[4]

Though agreeing with this theory, the court denied that evidence of the unit price of gravel was improper. In other words, the product of the factor of quantity (as conceded by the state) multiplied by the factor of price per unit was held inadmissible; but the factors themselves were held admissible. Recognizing that the criterion of compensation is the market value of the land in a voluntary sale between an owner willing to sell and a purchaser willing to buy,[5] the court concluded that exclusion of the factors as well as the product would deprive the jury of a proper guide in determining the fair market value of the land. The court quoted NICHOLS, EMINENT DOMAIN, as follows: "If the extent and quality and value of the stone as it lies on

[3] United States v. Land in Dry Bed of Rosamund Lake, California, 143 F.Supp. 314 (S.D.Cal. 1956); 4 NICHOLS, EMINENT DOMAIN 248 (3d ed. 1951); Horgan, *Mineral Valuation in Eminent Domain Cases*, 7 HASTINGS L. J. 163 (1956); Annot., 156 A.L.R. 1423 (1945).

[4] NICHOLS, EMINENT DOMAIN 248 (3d ed. 1951), and authorities cited.

[5] Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 407 (1879); Phillips v. United States, 243 F.2d 1, 4 (9th Cir. 1957); Seattle & M. Ry. v. Roeder, 30 Wash. 244, 70 Pac. 498 (1902); Annot., 156 A.L.R. 1416 (1945).

the land may not be considered, there would be no way by which the value of the land with the minerals could be shown." [6] In concluding this point, the court observed that, "unless we can say that if we were buying a gravel pit we would not regard the amount of the gravel, or its value in the land, as a relevant fact in determining its market value, we must of necessity hold that the evidence offered should have been admitted." [7]

Up to the point of admitting evidence of unit price, the court has a substantial foundation of both case and textual authority. Market value based upon a voluntary transaction between the parties is the commonly accepted standard of compensation.[8] It is also generally stated that in evaluating land, consideration must be given to the existence of mineral deposits but that it is error to determine the compensation therefor by finding the product of the quantity of the mineral multiplied by the price per unit.[9]

Only in admitting evidence of unit price, then, does the court enter into an area of less uniform doctrine. In this area the court relies on statements in *Seattle & M. Ry. v. Roeder,*[10] and *National Brick Co. v. United States,*[11] to the general effect that the value of the mineral in place is evidence necessary for the jury to have in order to ascertain the value of the land. Other authorities go only so far as to state that unit price may be considered only by an expert as a basis upon which he may in part base his evaluation.[12] Nichols, upon a page subsequent to that cited by the court, says, in reference to the quantity and quality of mineral deposits, "these are elements only to be considered with others in determining the value of the property," and "such factors are proper when treated only as contributory factors

[6] 4 NICHOLS, EMINENT DOMAIN 245 (3d ed. 1951).

[7] 51 Wn.2d 722, 728, 321 P.2d 912, 916.

[8] Town of Issaquah, 31 Wn.2d 556, 197 P.2d 1018 (1948); Sacramento Southern R.R. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); United States Gypsum Co. v. Mystic River Bridge Authority, 329 Mass. 130, 106 N.E.2d 677 (1952); *In re* Board of Water Supply of City of New York, 277 N.Y. 452, 14 N.E.2d 789 (1938); United States v. Toronto, H. & B. Nav. Co., 338 U.S. 396 (1949); 4 NICHOLS, EMINENT DOMAIN 27 (3d ed. 1951), and authorities cited.

[9] Forest Preserve Dist. v. Caraher, 229 Ill. 11, 132 N.E. 211 (1921); Nedrow v. Michigan-Wisconsin Pipeline Co., 246 Iowa 1075, 61 N.W.2d 687 (1953); Ross v. Commissioners of Palisades Interstate Park, 90 N.J.L. 461, 101 Atl. 60 (1917); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 165 (2d ed. 1953) and authorities cited.

[10] 30 Wash. 244, 70 Pac. 498 (1902).

[11] 131 F.2d 30, 31 (D.C.Cir. 1942).

[12] United States v. Land in Dry Bed of Rosamund Lake, California, 143 F.Supp. 314 (S.D.Cal. 1956); United States v. 70.39 Acres of Land, 164 F. Supp. 451 (S.D.Cal. 1958).

to the ascertainment of market value rather than as the criterion thereof."[13]

The dissenting opinions in the *Mottman* case criticize the admission of unit-price evidence on the ground that it tends to invite the jurors to make a separate evaluation of the worth of the gravel in their own minds, based upon the factors of quantity and unit price. They maintain that the only permissible use of unit price is by an expert witness, using it, not as a basis for determining the value of the mineral, but as a factor in evaluating the tract of land as a whole.

Though not persuasive enough under the present circumstances to alter the opinion of the majority, this theory shows the direction from which attacks upon unit price evidence might come. While held admissible in the *Mottman* case, it would be inaccurate to state without qualifications that this case completely opens the way for the admission of such evidence. The product of unit price multiplied by quantity is never admissible, nor are estimates of the value of minerals after removal from the land. Unit price evidence is properly introduced only in explanation and support of estimates made, not of the separate value of the minerals, but of the market value of the property with the minerals in place.

JAMES D. NUTTING

Additional Compensation to Elected Officials. Two recent cases involving substantially similar questions of law were initiated by the attorney general, in which he petitioned for writs of mandamus to prevent the further issuance of warrants for expense allowances to certain elected officials: *State ex rel. O'Connell v. Yelle,* 51 Wn.2d 594, 320 P.2d 1079 (1958), involving commuting and living expenses for the secretary of state, state auditor, and other officials semi-permanently residing at Olympia, pursuant to Laws of 1957, ch. 300, p. 1231; and *State ex rel. O'Connell v. Yelle,* 51 Wn.2d 620, 320 P.2d 1086 (1958), involving four-hundred-dollar monthly payments to the speaker of the house for time spent performing duties at Olympia after the end of the regular legislative session, pursuant to Laws of 1957, ch. 300, p. 1223.

In both instances the attorney general asserted that such payments were in violation of the Washington Constitution, art. II, § 25, and art. III, § 25, and art. XXVII, amendment 20, § 1, which sections state in essence that the compensation to an elected official shall not be increased during his term of office. The court agreed with the attorney general in both cases and ordered the state auditor to desist from issuing any further warrants for the above-mentioned purposes.

The court found it necessary to distinguish the case of *State ex. rel. Todd. v. Yelle,* 7 Wn.2d 443, 110 P.2d 162 (1941), in which legislation granting to legislators five dollars per day for traveling and living expenses while in Olympia had been held constitutional. The point made by the court in that case was that the five-dollar-per-day allowance was not additional compensation but recompense for expenses neces-

[13] 4 NICHOLS, EMINENT DOMAIN 248 (3d ed. 1951).

sarily incurred because of the cost of keeping up two residences for the sixty-day period. By way of contrast with the present cases, the court pointed out that semi-permanent officials would be expected to make their residence at Olympia and therefore would not have such recompensible expenses, and the additional money paid them would not be "expense" money but more properly would be classified as additional compensation. The court rejected the argument that, since legislators as well as semi-permanent officials should anticipate certain necessary incidental expenses associated with the job they sought, any allowances made to one group should be equally allowable to the other.

In the second case, the house resolution purporting to authorize additional pay for the speaker of the house was attacked on the grounds of its being an act by one branch of the legislature regarding a subject matter which required action by the legislature as a whole, according to art. XXVIII, amend. 20, § 1. This attack upon the validity of the resolution itself was not decisive, however, as the court rested its decision on the unconstitutional objective of the resolution. The court found that the resolution would have the effect of increasing an elected official's compensation during his term of office and was therefore unconstitutional.

The argument was advanced that the speaker of the house should be looked upon as having a dual capacity because of the many duties he is required to perform in addition to his legislative functions, such as staying four or five months after the legislative session at Olympia to wind up legislative activities. The court declined to regard the speaker as having such a dual capacity. Since the speaker has over the past decade and more received additional sums of money for clearly discernible expenses not incurred by the other members of the legislature, it seems the court preferred to look at form rather than substance when it decided to reject the dual-capacity theory.

Since the court seemed reluctant to deviate from a literal interpretation of the constitution, the legislature in drafting future measures providing for their own reimbursement for expenses will have to use wording specifically to negative the idea that they are voting themselves additional compensation during a term of office.

Zoning Law—Effect of Change in Zoning Ordinance on Prior Application for Building Permit. In *Hull v. Hunt,* 153 Wash. Dec. 109, 331 P.2d 856 (1958), the Washington court held that where an application for a building permit had been filed, a subsequent change in the zoning law had no effect upon a permit issued in accordance with the prior law.

On January 16, 1958, respondents applied for a building permit to build a twelve-story apartment building in Seattle. Respondents, at that time, did not own building rights in all of the land on which the apartment was to be built. The permit was issued on February 26, the day before a new zoning ordinance which limited all buildings in that area to a height of thirty-five feet, became effective. Appellant, a neighboring landowner whose scenic view would be blocked by the proposed apartment building, sought an injunction to prevent the construction. The injunction was denied, and the state supreme court affirmed.

The court acknowledged the general rule to be that a building permit can be revoked by subsequent changes in zoning law which prohibit buildings of the kind described in the application for the permit. Most jurisdictions, added the court, modify this general rule with the exception that a permittee who has changed his position in reliance on the permit has a vested right, protected by the courts. Since respondents had not changed their position before the new zoning law became effective, they did not come within the recognized exception of the majority rule.

The Washington court had previously added another exception to the general rule when, in *State ex rel. Ogden v. Bellevue,* 45 Wn.2d 492, 275 P.2d 899 (1954), it held

that an *owner* of property acquired a vested right to put his property to any use sanctioned by the zoning law in effect at the time he made an application for a permit. The court has now renounced the majority rule and not merely created another exception.

In the *Hull* case, apparently the fact that the permit was issued before the new ordinance became effective was not important. In taking its stand contrary to the weight of authority, the court said, "The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, *applies* for his building permit, if that permit is thereafter issued." (Emphasis added.)

Charter Amendment of Municipal Corporation-Notice. In the case of *Burns v. Alderson,* 51 Wn.2d 810, 322 P.2d 359 (1958), the validity of a Yakima election, in which its city charter was amended by initiative, was challenged as being unconstitutional. The court decided (5 to 4) that the election results were void because the proponents of the charter amendment had failed to comply with the state constitutional requirement in art. X, § 10, of giving voters thirty days notice of pending elections. The principal differences of opinion revolved around the question of whether the constitutional requirement of notice was meant to apply to the initiative method of amending city charters or whether it was limited to methods existing at the time the constitutional provision was adopted. Under the majority view, the constitutional notice was held a mandatory requirement applicable to methods unknown at the time the constitution was adopted.

The fact that the legislature stated, via the 1903 statute creating the initiative mode of change, that it was to be a concurrent and additional method did no dissuade the majority from their position. The court concluded that, although fifteen per cent of the voters had signed a petition prior to the election, this was not compliance with the thirty-day notice requirement of the constitution.

Four judges dissented, contending that, since the obvious purpose of the constitutional language was to insure notice to interested voters, the subsequently conceived initiative method of amendment substantially accomplished this purpose. The dissenting view was that the substantive effect should have over-ridden the strict literal meaning given the constitution.

TAX

Excise Tax on Sale of Real Estate—Effect of Subsequent Rescission. In *Perkins v. King County,* 51 Wn.2d 761, 321 P.2d 903 (1958), the Supreme Court of Washington affirmed a dismissal by the Superior Court of King County of an action against King County for the refund of an excise tax paid by the appellant. The tax was imposed upon the execution of a contract of sale under which the appellant was to transfer certain real estate to a purchaser. Subsequently, the parties to the contract of sale made an agreement to rescind. Appellant then applied for a refund of the excise tax on real estate sales which he had paid and was refused. He then brought an action to recover.

The court, in affirming the lower court action, referred to the language of RCW 28.45.010, which states that "the term 'sale' . . . shall include . . . any contract for . . . conveyance . . . or transfer" of ownership or title to real property. The court then reasoned that, since a contract of sale falls within the definition of the term "sale" in RCW 28.45.010, it was a taxable event at the time it occurred. The court rejected the appellant's contention that the operative effect of an agreement to rescind is to make the contract void at its inception—in effect, as though it never happened.

The contract to rescind is a separate and distinct agreement between the parties, under which each releases the other from further contract obligations under the